AKIN KHAN BIN ABDUL RAHMAN v. PUBLIC PROSECUTOR

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Syed Agil Barkabah S.C.JJ.) September 9, 1986 & February 15, 1987]

[Kota Bharu – Supreme Court Criminal Appeal No. 39 of 1985]

Dangerous Drugs – Charge of trafficking in dangerous drugs – Presumption under section 37 of Dangerous Drugs Act – Burden on accused to rebut presumption – Balance of probabilities – Dangerous Drugs Act, 1952, ss. 37(d) & (da) (vi) & 39B(2).

Evidence – Burden of proof on accused to rebut presumption – Quantum of proof – Balance of probabilities – Evidence Act, 1950, s. 3.

Criminal Law and Procedure – Presumption under Dangerous Drugs Act 1952, s. 37 – Balance of probabilities.

In this case the appellant had been found guilty on a charge of trafficking in 931 grammes of cannabis and sentenced to death. The only ground of appeal was that the learned trial judge had applied the wrong quantum of burden in coming to his finding that the appellant had failed to rebut the presumption raised by the prosecution evidence. The learned trial judge in his judgment had said: "Having deliberated dutifully on the defence I was of the considered opinion that the accused's version had failed to rebut the presumptions raised by the prosecution and was in effect a mere denial of the charge calculated only to pervert the course of justice. It could not be considered to be consistent with innocence or be reasonably true on a balance of probabilities."

Held: (1) in this case the first limb of the words implying the burden upon the appellant "to be consistent with innocence" is a term commonly used by courts to indicate the ordinary burden of proof upon an accused on the defence being called. It is the lesser burden and if applied can hardly be objectionable;

(2) the next limb "it could be considered to be reasonably true on a balance of probabilities" is the heavier burden which the law places upon an accused once the presumption comes into effect;

(3) the questions raised in the appeal would not have arisen had the learned judge confined himself to the time honoured description of this burden as commended in *Yuvaraj's*(1) case *i.e.* on the balance of probabilities.

Cases referred to:

(1) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.
(2) *R.* v. *Carr Briant* [1943] K.B. 607.

SUPREME COURT.

Teoh Poh Onn for the appellant.

Zaini Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the Judgment of the Court): The appellant was charged with trafficking in 951 grammes of cannabis, an offence punishable under section 39B(2) of the Dangerous Drugs Act 1952. He was found guilty and was accordingly sentenced to death.

The learned counsel for the appellant's sole ground of appeal is that the learned trial Judge had applied the wrong quantum of burden in coming to his finding that the appellant had failed to rebut the presumption raised by the prosecution evidence, and in consequence the appellant was entitled to an acquittal.

The prosecution case was that PC Wahed bin Yusof had, on August 21, 1983, acting on information received, stopped the appellant who was carrying a bag in which were articles of clothing, a prayer mat and a quantity of green leaves, or to be exact, leaves wrapped around little sticks. He obtained the help of a passer-by Hassan bin Idris to hold the accused whilst he fetched his handcuffs and his motorcycle from his house nearby, taking with him the bag P7 which he left at his doorstep within sight whilst he was inside the house. He subsequently handcuffed the appellant and then took him to the Police Station where he handed the exhibits C to the O.C.S., PW. 4.

PW.4 counted the 540 sticks which weighed 1250 grammes. These sticks were later handed to the Chemist who weighed the leaves minus the sticks and found the leaves to weigh 950 grammes, the quantity mentioned in the trial.

A cautioned statement was recorded from the appellant which the learned trial Judge held to be inadmissible because it was taken in standard Malay by the recording officer whilst the appellant's mother tongue was Pakistani though he also spoke Thai and Pattani Malay.

As the learned Judge correctly noted the case largely depended on the testimony of the Chemist (PW.1), the P.C. (PW.3) and the by-stander (PW.8), all of whom had impressed him as honest and truthful witnesses whose evidence he had no reason to doubt. His Lordship dealt with apparent discrepancies and certain other relevant points brought out in cross-examination of prosecution witnesses with commendable thoroughness.

He then held that the prosecution evidence had raised the presumption under section 37(d) and (da) (vi) of the Act.

Then he proceeded to consider the testimony of the appellant. The appellant said that he had gone to Jerteh, Trengganu from his hometown Narathiwat in Thailand on July 1, 1983, in an attempt to collect debts owing to his father from one Roni @ Ghani bin Yusoff. When Roni was unable to pay, the appellant then asked if he could stay and work in Jerteh, but was told that there were no jobs available. He then returned to Thailand. On August 5, 1983, he met Roni at Yala in Thailand and was told that there was a job available at Jerteh, but the appellant could not go because he had work to do in Yala.

On August 21, 1983, however he crossed over to Malaysia without any travel documents carrying his bag P7 in which admittedly there were the prayer mat and the articles of clothing later found but not the ganja. On the Malaysian side he was arrested by a person who identified himself as a police officer, and who after examining the contents of his bag told him he was being arrested for not having travel documents. He was then taken to a house and leaving him outside the arresting officer entered the house taking along the bag P7. Three men present outside the house urged him to run but he refused to do so saying that he had committed no offence except for entering the country with no travel documents. The arresting officer subsequently emerged, handcuffed him and took him to the Pengkalan Kubor Police Station. He was not shown any cannabis there. He was then taken to Tumpat Police Station and it was there that he was shown his bag which now also contained some dried leaves whereupon he denied that the dried leaves were his. He claimed to be a cloth merchant, doing business in Thailand.

The police located Roni who together with his wife were called as prosecution witnesses. Though both said their hometown was Narathiwat they denied knowing the appellant. The learned Judge expressed his scepticism on the necessity for the appellant to stay and work in Jerteh if he was already a cloth merchant in Narathiwat, since no explanation had been given for his desire to change both occupation and place of residence.

The Judge also noted that substantial difference between the appellant's version of his arrest and that of the prosecution, particularly his insistence that the arresting officer had taken the bag into his house and the absence of Hassan bin Idris (PW.8). The learned Judge remarked that this was probably to insinuate that PW.3 had planted the cannabis into the bag during that period of time.

We should perhaps set out in full the remainder of the judgment:

> "Having seen and heard the accused and considered his defence as a whole, I did not believe him. In view of PW3 and PW8's earlier testimony, I held that the accused's version was merely a concoction to suggest that it was PW3, when he went into the house alone with the bag leaving the accused outside, or subsequently somewhere in one of the police stations, who had put in the cannabis into the accused's bag so as to frame the accused up for this offence. In the absence of any grudge or misunderstanding, surely if PW3 was going to nail the accused on a capital charge such as this, he would not have left the accused unguarded outside his house while he took steps to plant the incriminating evidence. He had ample time at the Pengkalan Kubor Police Station to do so if, as the accused had alleged, the accused had not seen the bag until much later at the Tumpat Police Station. As regards this fact that the accused said he never saw the bag and its contents at Pengkalan Kubor Police Station but only later at Tumpat Police Station after the cannabis had been put in, PW4 had earlier stated, and I had accepted his evidence, that the bag and its contents were examined in the accused's presence at the Pengkalan Kubor Police Station and PW3 also counted at the same time. The accused's allegations of assault at both the Pengkalan Kubor and Tumpat Police Stations were also not substantiated by any other evidence. Further the contents in P7 does not in any way support the accused's contention that he was going to stay and work in Jerteh for an indefinite period.
>
> Having deliberated dutifully on the defence, I was of the considered opinion that the accused's version had failed to rebut the presumptions raised by the prosecution and was in effect a mere denial of the charge calculated only to pervert the course of justice. It could not be considered to be consistent with his innocence or be reasonably true on a balance of probabilities."

The essence of this finding is that the learned trial Judge did not believe the appellant at all.

The *locus classicus* of cases on the shift of proof where a presumption comes into effect is that of *Public Prosecutor* v. *Yuvaraj*[1] which confirms earlier decisions that the burden upon an accused person would be the same as that applied in civil proceedings, *i.e.* the balance of probabilities. In *Yuvaraj's* case, the question reserved for the decision of the Federal Court under section 66 of the Courts of Judicature Act 1964 and later on appeal considered by the Privy Council was:

> "Whether in a prosecution under section 4(a) of the Prevention of Corruption Act, a presumption of corruption having been raised under section 14 of the said Act the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable or whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists. (Section 3 of Evidence Ordinance)."

Their Lordships of the Privy Council held that there was no relevant difference between the two descriptions of the burden of proof of rebutting the presumption of corruption. In the instant appeal the words implying the burden upon the appellant were "it could not be considered to be consistent with his innocence or be reasonably true on a balance of probabilities." The first limb thereof *i.e.* "to be consistent with his innocence" is a term commonly used by the courts to indicate the ordinary burden of proof upon an accused person on the defence being called, it is the lesser burden also sometimes expressed as "a story which has thrown a reasonable doubt on the truth of the prosecution case – see those cases referred to in *Mallal's* Criminal Procedure 4th Edition 276 under the heading "Explanation consistent with innocence." Such lesser burden if applied can hardly be objectionable.

The next limb *i.e.* "it could not be considered to be reasonably true on a balance of probabilities" is the heavier burden which the law places upon the accused once the presumption comes into effect, as was held in *Rex* v. *Carr Briant*[2] referred with approval in *Public Prosecutor* v. *Yuvaraj* (*supra*).

If we may with respect suggest, the questions raised in the present appeal would not have arisen had the learned Judge confined himself to the time-honoured description of this burden as commended in *Yuvaraj's* case, *i.e.* "on the balance of probabilities."

We dismiss this appeal and would confirm both the conviction and the sentence.

Appeal dismissed.

Solicitors: *H.S. Lim, Teo & Partners.*

SANITA MANUFACTURING (MALAYSIA) SDN. BHD. & ANOR. v. CHANCHAI AROONRATANAWONGSE

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) September 10, 1986 & February 15, 1987]

[Kota Bharu – Supreme Court Civil Appeal No. 314 of 1985]

Trade Marks – Registration of trade mark by agent – Entry altered on application of agent without authority – Application to expunge alteration – Trade Descriptions Act, 1972, s. 16(1) – Trade Marks Act, 1976, s. 45(1)(a)

In this case a company in Bangkok by the name of Sanita Manufacturing Co. Ltd. engaged in the manufacture of sanitary napkins entered into an agreement with the second appellant for the sale and distribution of the sanitary napkins in Malaysia and Singapore. The respondent was the managing director of the company in Bangkok. In pursuance of the agreement between them, the second appellant submitted an application to have the "Sanita" trade mark registered in the name of the respondent. The trade mark was duly registered and the respondent became the registered proprietor of the trade mark. Subsequently however the second appellant applied to replace the respondent as the registered proprietor of the trade mark and to insert the name of the first appellant. The first appellant then applied for a trade description order under section 16(1) of the Trade Description Act, 1972. The respondent filed a notice for an order that the entry submitted by the second respondent be expunged from the register and the respondent be restored as the registered proprietor of the said trade mark. Judgment was given for the respondent in the High Court and the appellants appealed.

Held: since there was evidence on which the learned judge relied to hold that the second appellant had fraudulently and without the knowledge and consent of the respondent altered the entry in the Register of Trade Marks, the alteration should be expunged from the register.

Case referred to:

(1) *G.E. Trade Mark* [1973] R.P.C. 297.

[*Cases cited: Noblitt-Sparks Industries Inc.'s Application for Rectification of the Register of Trade Marks* (1950) 68 R.P.C. 168; *"Consort" Trade Mark* [1980] R.P.C. 160; *"Wells Fargo" Trade Mark* [1977] R.P.C. 503; *Mouson & Co.* v. *Boehm* (1884) 26 Ch.D. 398; *"Weston" Trade Mark* [1968] R.P.C. 167; *In re Leonard & Ellis's Trade Mark – Leonard & Ellis* v. *Wells* (1884) 26 Ch. D. 288; "GE" Trade Mark [1970] R.P.C. 339; *Leather Cloth Co.* v. *American Leather Cloth Co.* (1865) 11 H.L. 523, 534; *"Zoppas" Trade Mark* [1965] R.P.C. 381; *"Gynomin" Trade Mark* [1961] R.P.C. 408; *In re Heaton's Trade Mark* (1884) 27 Ch. D. 570; *"Quiet May" Trade Mark* [1967] F.S.R. 27; *William Brandt's Sons & Co.* v. *Dunlop Rubber Co. Ltd.* [1905] A.C. 454; *Letts* v. *Inland Revenue Commissioners* [1956] 3 All E.R. 588; *Lever (Finance) Ltd.* v. *Westminster Corporation* [1970] 3 All E.R. 496; *Wells & Ors.* v. *Minister of Housing and Local Government & Anor.* [1967] 1 W.L.R. 1000; *Re L (AC) (an infant)*